Filed 6/30/09 In re K.H. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re K.H., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. NOEL H., Defendant and Appellant.	G041180 (Super. Ct. No. DP015839) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Caryl Lee, Judge. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, Karen L. Christensen, Debbie Torrez and Nicole M. Lohr, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

Noel H. (Mother) and John O. (Father) are the parents of 18-month-old K.H. (hereafter Kyle).[1] Mother appeals the juvenile court's order asserting jurisdiction under Welfare and Institutions Code section 300, subdivisions (a) and (f).[2] She also challenges the court's order denying her reunification services pursuant to section 361.5, subdivision (b)(4) and (5). Father is not a party to this appeal. We conclude Mother's claims on appeal lack merit and affirm the order.

I

In August 2007, four-week-old Kyle was taken into protective custody after his 23-month-old brother, D.H. (hereafter Daniel), died of injuries consistent with severe ongoing child abuse and neglect. Mother was arrested for felony child abuse and for an outstanding warrant regarding the sale of a controlled substance. She had a history of prior arrests and convictions for drug-related crimes.

Mother's family had a "lengthy and extensive history" with the social services agencies in Riverside and Orange Counties. When Mother was 12 years old, she was declared a dependent of the Riverside County Juvenile Court after she became pregnant with a child conceived after being sexually abused by her brother.

A child abuse report was filed in April 2006 regarding the general neglect of then seven-month-old Daniel. It was alleged Mother was using drugs and in a domestic violence relationship. Her boyfriend had been hospitalized after Mother's

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[1] For the sake of clarity, convenience, and confidentiality, we have created pseudonyms for K.H. and his brother D.H. for purposes of this opinion.

[2] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

father and brother beat him with a baseball bat. The court detained Kyle and did not order visitation for Mother, who was still incarcerated.

In October 2007, the juvenile court appointed Special Master Michael Pursell for an in camera review of documents from the crime pursuant to *Michael P. v. Superior Court* (2001) 92 Cal.App.4th 1036 (regarding disclosure of criminal investigative files). The Special Master made findings and recommendations that the court received and considered. In addition to determining which documents were relevant, the Special Master stated in his report, "Three of the four grounds specified in the [section] 300 petition involve the death of [Daniel]. From the evidence it is unlikely that Mother administered the abuse that caused the child's death. This does impact upon the State's interest in refusing to disclose evidence indicating who the direct killers may be . . . ."[3]

In the reports prepared for the jurisdiction/disposition hearing, Orange County Social Services Agency (SSA) provided details about the events leading up to Daniel's death. Mother and her sister, Ilene, took Daniel to the hospital at 11:30 a.m., claiming Daniel was having trouble breathing. When they arrived, Daniel had no pulse and attempts at resuscitation failed. The report filed at the time noted the following injuries: a red and enlarged anus, extensive facial trauma, abdominal bruising, a handprint to the left arm, an old fracture to the right clavicle, and enlarged sagital suture, a right ankle deformity, possible cigarette burns to the shoulders, a swollen nose, and subconjunctival bleeding.

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[3] We grant Mother's supplemental request to augment the record on appeal with a copy of the Special Master's report.

Daniel lived with Mother in a one-room converted garage with Mother's 16-year-old brother, Timothy, and her sisters Dorothy and Ilene. Also living in the garage was Ilene's boyfriend, Miguel, and their four-year-old son, Ezekiel. The family members provided conflicting stories about the events surrounding Daniel's death.

Ilene's Version: Ilene sent a letter to the social worker stating she was at work the day Daniel died. She went home to bring the children lunch around 11:00 a.m., and found Daniel asleep on the couch. Daniel would not wake up, and Mother called his doctor. They took him to the emergency room where he died. When later interviewed, Ilene admitted she picked up Daniel from the couch and shook him hard to try to wake him. At the hospital, she was questioned about a bruise on Daniel's forehead. She explained he fell down five stairs a few days prior while they were walking to a neighborhood pool. Ilene stated she had cared for Daniel since he was a baby and she considered him to be her son. She stated Daniel had several ongoing problems that concerned her. Ilene had taken him to the doctor on several occasions due to his refusal to eat. Ilene was concerned he was so skinny, she could see all his bones, and he was often "lifeless." She stated Daniel was not playful, active, or affectionate. She also described him as having seizure-like behaviors, "which she demonstrated as his clenching his teeth and fisting his hands and his body trembling." She also reported Daniel would pick his hands until they bled. She adamantly denied Daniel was being abused, stating her nephew was "'real clumsy,'" "forever getting hurt[,]" and bruised easily.

Miguel's Version: Miguel stated Mother had a drug problem and was living on the streets when Daniel was born. Mother gave Daniel to Ilene when he was three weeks old. When Daniel was five months old, Mother resumed taking care of him because she had found a boyfriend willing to care for both of them. However, one year later, Mother gave Daniel back to Ilene for a few months because she was still on drugs and with a new guy who complained Daniel was a "'cry baby.'" Two months later,

Mother moved in with Ilene because her boyfriend was abusing her. Miguel recalled Mother at times would become frustrated and complain Daniel was not listening to her. He described Mother as being like a child, and observed she watched Nickelodeon all day.

Miguel saw Daniel had bruises on his face the night before he died. The morning he died, Miguel saw Daniel throw up his breakfast. He helped Mother put Daniel in the shower and then Daniel was placed in front of the television. Within 10 minutes, Miguel noticed Daniel "appeared to have fallen forward with his head on the ground in between his legs." Miguel said he was worried and knew Daniel had lost consciousness on two other occasions. They gave Daniel water to drink and again tried to wake him up by putting him in the shower. When these efforts failed, Mother held Daniel in her arms and repeatedly said, "'he's tired.'" Miguel tried to contact Ilene at work to tell her what was happening. By the time she arrived home, Daniel was lying on the couch, he was not responsive, his eyes were half closed and rolling back, and he was taking "really deep breaths."

Miguel recalled that over the past six months Daniel had not been eating but was always thirsty. When they took him to the park, he would just sit on the grass and "stare off." He was not interested in playing or interacting with the other children. Miguel thought Daniel's lethargy was due to his refusal to eat. Miguel said Daniel was well behaved but would pick his hands, feet, and penis until they bled. He said Mother had no control over Daniel, and he would not obey her. Miguel said it bothered him that Daniel would disregard Mother and throw temper tantrums whenever she tried to get his attention or redirect him.

Timothy's Version: On the day Daniel died, Timothy was home. He said Daniel would "throw fits" and Daniel picked his hands until they bled. He opined the toddler was "a fuckin' tweaker. My sister tweaked with him." At first, he denied hitting Daniel but later admitted Mother instructed him to discipline and hit Daniel. He admitted

hitting Daniel on the bottom with his hand and with a belt. Timothy said the day before Daniel died, he gave the child a shower. Timothy said Daniel fell and cut his eye and his nose bled. He recalled Daniel had also fallen at the beach and at the pool earlier that week. He denied ever hitting Daniel's head. He stated Ilene also hit Daniel.

Ezekiel's Version: Five-year-old Ezekiel was interviewed a few days after Daniel's death. He said he saw Ilene spank Daniel "really, really, really, really hard." Ezekiel also witnessed Ilene, Timothy, and Miguel strike Daniel with a belt "a lot." He said Timothy hit Daniel in the eye and mouth, and Timothy held Daniel "really, really hard [and Daniel] almost died." He remembered Miguel hit Daniel in the stomach, which made it difficult for Daniel to breathe. Ezekiel said Mother also hit Daniel frequently and "really hard." He stated Daniel's body was black and brown. Ezekiel stated he was playing the Halo II video game when Timothy and Miguel were hitting Daniel, and Daniel's cries were so loud it caused Ezekiel's video game character to die.

Mother's Version: Mother said she was Daniel's primary caretaker, but Ilene helped her when she was home. Mother explained she sent Daniel to live with Ilene because he kept getting sick and Mother was in an abusive relationship. Mother stated Daniel had refused to eat food, would vomit after eating anything, and was underweight for his age. She said the doctor did not know what was wrong with him and had prescribed cream for his scarred hands.

Initially, Mother claimed Daniel fell down the stairs and sustained a black eye. She then said he hit his eye on a corner of the bed. She stated Daniel also injured his face when he fell at the beach a few days earlier. Mother later admitted she was lying when she said Daniel was injured from falling down stairs. She stated the injury to Daniel's eye occurred when Timothy took Daniel into the shower with him. She explained every time they showered, Daniel "comes out with a new bruise because he either hit[s] himself on the wall, or fall[s] on the ground, and hit[s] himself on the tile."

The morning Daniel died, Mother stated she heard Daniel scream in the shower and she asked Timothy what had happened. Timothy told her Daniel "didn't want to get his face wet and he fell." Mother stated both Timothy and Miguel gave Daniel showers. She also noted Daniel "fell every day."

Mother stated that after Daniel fell in the shower, Timothy and Miguel made Daniel stand naked facing the bedroom wall and Timothy beat him repeatedly with a belt. Mother saw Daniel was crying and screaming and looking at her. At some point, during the beating Mother said she told Timothy to "'knock it off'" and leave Daniel alone. Daniel passed out and Miguel took him back to the shower to wake him with cold water. When Miguel put him in the shower, Daniel screamed and vomited. Soon thereafter, Ilene came home and they took Daniel to the hospital.

The Medical Experts: Dr. Sandra Murray, a medical expert in child abuse, testified that Daniel's abuse likely started the year before based on the fact in September 2006, Mother took Daniel to the hospital for a cut on his upper lip. Mother claimed Daniel was injured when he chewed on a television remote control. Murray opined the tear to Daniel's lip would have occurred from trauma, such as falling and hitting the lip area or a nonaccidental blunt force. After the injury, the records show Daniel's weight dropped significantly (from the 75th percentile to the 25th percentile within four months). At the time of his death, he was below the 5th percentile.

Dr. Anthony Juguilon, a forensic pathologist, testified there were 33 contusions on Daniel's head and neck. These injuries were inflicted at different times, dating between 24 hours to several weeks old. Juguilon testified Daniel's death was homicide and it was "a clear and unequivocal case of acute and chronic repetitive child abuse . . . ." He stated the cause of death was clear early in his external examination of the body and his opinion was based on the multiplicity, location, and different ages of the contusions. He testified Daniel's death could not have been caused by an accidental fall but rather by one or multiple blows to the head. He estimated the fatal injury would have

occurred approximately 24 hours before his death and it was unlikely to have been caused by a leather belt. Juguilon stated behaviors such as vomiting, dizziness, listlessness, and seizures were symptoms of a brain injury. He noted many of Daniel's older injuries would have been visible when he was alive.

At the hearing, the court considered the evidence and argument of counsel. It amended the petition to delete the references to Daniel's injured anus and the cigarette burns. It sustained the remaining allegations in the petition. It concluded Mother must have known about the abuse being inflicted to her son. The autopsy photographs showed her child's face was full of bruises, she admitted knowing Daniel was injured after every shower, and yet she failed to intervene or seek help. The court found the expert testimony and conclusions regarding child abuse uncontroverted. It stated it found all Daniel's family members "less than candid" except Ezekiel, who discussed the abuse to Daniel as if it was a normal daily occurrence "just like going to school." The court concluded "the evidence is not clear if Mother was the actual perpetrator, but it is clear that in this case Mother knew or should have known."

At the dispositional hearing in September 2008, the court learned Mother visited Kyle from February to July once a week. She had not visited Kyle since July because she had not been cleared by a physician from being "contagious." The social worker reported Kyle had developmental disabilities that had the qualities of autism. Kyle lacked vocalization, experienced anxiety with strangers, exhibited repetitive motions, and had difficulty eating. He could not entertain himself with toys or hold toys like other children his age. He vomited frequently while sleeping. He was receiving specialized therapy, but the social worker opined he needed a multi-treatment unit for more in-depth services.

The social worker recommended Mother's visits be limited to once a month due to Kyle's severe reactions to strangers. She testified, "The child has demonstrated a deterioration in his ability to interact with individuals and his anxiety, and that has

become more evident over the summer. And the Mother has not been a regular figure in his life, so we would be reintroducing an individual into his life that we would potentially be going and taking away from his again. [¶] And being that this child has so many special needs, I don't necessarily thing it's in his best interests to introduce more individuals that would be removed from his life. . . . [¶] . . . I would pretty much guarantee that he will not remember his mom or he will have reaction to her because he has not seen her in a couple of months, just based on my experience of this child . . . three weeks ago . . . ." The social worker explained Kyle had not been diagnosed as autistic yet, but his distress at seeing strangers could go on for an indefinite period of time if he was autistic or it could be simply a phase due to his developmental delay or special needs. The social worker stated that when she saw Kyle last, she "had to back away from him and the foster parent had to hold him and console him before he calmed down." The social worker did not believe it would be in Kyle's best interests for Mother to receive reunification services. Kyle needed a caregiver who could understand his special needs and participate in his required therapy and many medical appointments.

After considering argument from all the parties, the court determined Kyle's best interests would not be served by giving Mother reunification services. It noted Mother was a functioning adult who permitted serious abuse to take place, and Kyle's special needs were significant. It denied reunification services to Mother pursuant to section 361.5, subdivisions (b)(4) and (5).

II

The court sustained the petition under section 300, subdivisions (a), (b), and (f). Mother argues the court erred when it sustained the allegations under subdivisions (a) and (f). She maintains these erroneous findings are prejudicial since they affect other aspects of the case.

"'[I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. (*In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1111-1113 . . . [burden of proof in jurisdictional phase is preponderance of the evidence; burden of proof in dispositional phase is clear and convincing evidence when court awards custody to a nonparent]; see also §§ 355, 361, subd. (b) [now subd. (c)].) [¶] This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children. [Citation.]' [Citation.] [¶] 'Of course, on appeal, the substantial evidence test is the appropriate standard of review. Thus, in assessing this assignment of error, "the substantial evidence test applies to determine the existence of the clear and convincing standard of proof. . . ." [Citation.]' [Citation.]" (*In re Henry V.* (2004) 119 Cal.App.4th 522, 528-529.)

Accordingly, "If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. [Citation.] We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or evaluate the weight of the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record most favorably to the juvenile court's order, and affirm the order even if other evidence supports a contrary conclusion. [Citation.] The appellant has the burden of showing the finding or order is not supported by substantial evidence. [Citation.]" (*In re Megan S.* (2002) 104 Cal.App.4th 247, 250-251.)

Jurisdiction is proper under section 300, subdivision (a), if "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian. For the purposes of this subdivision, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of

serious physical harm." Subdivision (f) of section 300 requires evidence, "The child's parent or guardian caused the death of another child through abuse or neglect."

Starting with section 300, subdivision (a), Mother asserts there was no evidence Kyle suffered serious physical harm, so the only question was whether there was a substantial risk he "will suffer, serious physical harm inflicted nonaccidently . . . ." Mother asserts there is insufficient evidence she intentionally struck Kyle's brother, Daniel. Apparently, the inference she wishes to be made from this fact is there was no reason to believe she would strike Kyle.

To support her claim she did not strike Daniel, she points to the Special Master's conclusion it was unlikely Mother administered the abuse that caused Daniel's death. She asserts the only direct evidence she intentionally hit Daniel arises from Ezekiel's interview and the court should not have considered his statements. Mother claimed she objected to the court viewing the interview tape on the grounds Ezekiel did not qualify as a witness because he could not differentiate the truth from a lie when asked if he knew the difference. She misconstrues the evidence and the applicable law.

After Mother's counsel objected to the admission of Ezekiel's taped interview, county counsel argued Ezekiel qualified as witness because during the interview it became clear he could distinguish between the truth and a lie. The court received the DVD and transcript of the interview into evidence, stating it would evaluate "whether or not the information provided [was] credible in evaluating Ezekiel's credibility . . . ."

Contrary to Mother's contention, there is no rule excluding a young child's statements per se simply because he or she is too young to distinguish between the truth and a lie. As the Supreme Court explained in *In re Lucero L.* (2000) 22 Cal.4th 1227, 1247-1248, "[t]he admissibility and substantiality of hearsay evidence are different issues . . . . [T]he out-of-court statements of a child who is subject to a jurisdictional hearing and who is disqualified as a witness because of the lack of capacity to distinguish

between truth and falsehood at the time of testifying may not be relied on exclusively unless the court finds that 'the time, content and circumstances of the statement provide sufficient indicia of reliability.'" (Internal quotation marks and citations omitted.) In *Lucero*, a three-year-old child used words and gestures to the social worker, a police officer, her foster mother, and stepsister, all of which indicated her father had touched her vaginal area and buttocks. (*Id.* at pp. 1249-1250.) The Supreme Court found this type of consistent communication provided sufficient indicia of reliability to constitute substantial evidence on which to find the child was a dependent child of the dependency court. (*Ibid.*)

Mother does not comment on whether the content and circumstances of Ezekiel's statements provided sufficient indicia of reliability. After reading the transcript and watching the DVD of Ezekiel's interview, the court concluded the information the child provided was "beyond telling. This is a very young child and he was an extremely engaging witness. He was fairly articulate, as a four year old could be, and enjoyed coloring and talking to the interviewer, but was instructive in his consistency with the abuse that went on in his home. That is completely obvious. [¶] This is a very small location, with a lot of people living there, and this kid talked about this stuff happening as if it was normal. And it's abnormal in its normalcy."

We cannot second guess the court's finding Ezekiel was a credible witness. Moreover, it was not the only evidence the court relied upon in making the jurisdictional finding under section 300, subdivision (a). The Special Master's conclusion it was "unlikely" Mother administered the abuse, cannot be viewed as an endorsement of her mothering skills. Daniel's autopsy corroborated Ezekiel's story of acute, chronic, and ongoing child abuse. Mother admitted she was Daniel's primary caretaker and, like the trial court, we conclude it is inconceivable she was unaware of what was going on in their shared one-room converted garage. Worse, the evidence showed she endorsed much of the nonaccidental harm. She told Timothy to discipline Daniel, and she admitted

watching Timothy repeatedly strike her toddler with a belt. She knew Daniel was suffering physical harm after every shower with male family members, yet she did nothing to stop this obvious pattern of abuse. She does not offer any plausible excuse for her conduct. A finding under section 300, subdivision (a), does not require evidence Mother inflicted the fatal blows. There was evidence she hit Daniel. And the shocking evidence Mother at times requested, encouraged, and permitted others to physically abuse her young child was more than sufficient evidence from which the court could find Kyle was at substantial risk of suffering "serious physical harm inflicted nonaccidentally" by Mother if left in her care.

As for the section 300, subdivision (f), finding, Mother argues there was no evidence she caused Daniel's death because it was not established she "knew of the severity of the abuse, that it was ongoing or that, knowing of the abuse, she permitted it to continue." She claims there is no evidence showing she knew about Daniel's broken ankle or clavicle, or the severe beating Ezekiel described. The experts concluded the fatal injuries were inflicted sometime during the final 24 hours of his life. Mother notes she admitted seeing Timothy strike Daniel with a belt and hand in that time frame, but the expert concluded blows from a belt would not have been fatal.

This argument ignores the overwhelming evidence Daniel suffered chronic abuse for months. The autopsy and medical records confirmed Ezekiel's account of Daniel's life of repetitive and consistent abuse. Mother was Daniel's primary caretaker in a small residence. Daniel's bruises and injuries were so prominent and obvious that even the four year old noticed them. Daniel's loud cries were heard by everyone in the household. Mother may not have known which bones had been broken, but she admitted she heard his screams from the shower. Credible evidence supports the conclusion Mother caused Daniel's death through abuse or neglect.

Mother challenges Murray's expert opinion the abuse started 13 months prior as pure speculation because she did not speak to the doctors involved. Mother

points out the other doctors who had treated Daniel had not been suspicious of abuse. However, the credibility of the expert's opinion was for the trial court, not us, to weigh and consider. We note Murray's opinion regarding ongoing abuse was supported by the autopsy finding some of the contusions were several weeks old. Juguilon concluded the multiplicity, location, and varying ages of injuries was indicative of chronic repetitive child abuse. Moreover, Ezekiel reported repetitive and "really hard" blows inflicted by all members of the household. Mother admitted she witnessed and gave Timothy permission to beat Daniel numerous times.

Mother asserts it is not likely she "inflicted the abuse on Daniel. She lost her own autonomy at an early age, having been a dependent of the court and then an incest victim while under the court's supervision." She claims the evidence of her criminal records and diagnosis of mild mental retardation indicates she was a "follower" in the residence, and not a leader. She points to evidence Daniel was happy while in her care, she took him to the emergency room for treatment, and Daniel looked to her for protection. In essence, she is arguing she was an innocent bystander to the tragic events that occurred in this case. However, the evidence supports the court's contrary conclusion Mother played a more significant and active role in the months before Daniel's death. As noted by county counsel, the court reasonably relied on evidence Mother, despite her unfortunate childhood experiences, showed she often utilized her independent judgment and exhibited an ability to protect herself, i.e., she left an abusive boyfriend. Mother purposefully placed Daniel in her sister's care for long periods of time when Mother was living on the streets and knew she was unable to care for him. The court concluded she was a "functioning adult" who could drive and maintain employment. Her multiple trips to the emergency room and the doctor's office indicate she had the ability to recognize when Daniel was hurt and needed medical care. The

Special Master's finding Mother did not likely inflict the actual blows that killed Daniel, does not preclude the finding Mother's inexcusable neglect and endorsement of corporal punishment by other family members, resulted in abuse causing Daniel's death.

III

Mother argues the court erred in denying her reunification services. We disagree. "Section 361.5, subdivision (a)[,] explicitly directs the juvenile court to order child welfare services for the child and the child's parents whenever a child is removed from a parent's custody. 'This requirement implements the law's strong preference for maintaining the family relationship if at all possible. [Citation.]' [Citation.] Limited exceptions to this rule are listed in section 361.5, subdivision (b) (hereafter subdivision (b)). Specifically, subpart[] (4) . . . provide[s], in pertinent part: [¶] '(b) Reunification services need not be provided to a parent . . . described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (4) That the parent or guardian of the child has caused the death of another child through abuse or neglect. [¶] . . . [¶]' Once the juvenile court finds that one or more of these subparts of subdivision (b) applies, the court is prohibited from ordering reunification services unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child. (§ 361.5, subd. (c).)" (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 63-64 (*Ethan N.*).)

"When sufficiency of the evidence to support a finding is challenged on appeal, the appellate court determines if there is any substantial evidence to support the finding. [Citation.] Moreover, the court cannot reverse the juvenile court's determination, reflected in the dispositional order, of what would best serve the child's interest, absent an abuse of discretion. [Citation.]" (*Ethan N., supra*, 122 Cal.App.4th at pp. 64-65.)

"It has often been noted that '[f]amily preservation, with the attendant reunification plan and reunification services, is the first priority when child dependency proceedings are commenced.' [Citation.] However, . . . 'Once it is determined one of the situations outlined in subdivision (b) applies, the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]' Subdivision (b)(4) of section 361.5 evidences the Legislature's recognition that some situations are so extreme as to require extraordinary caution in recognizing and giving weight to the usually desirable objective of family preservation. As noted in *In re Alexis M.* (1997) 54 Cal.App.4th 848, 850-851 . . ., when child abuse results in the death of a child, such abuse 'is simply too shocking to ignore' in determining whether the offending parent should be offered services aimed at reunification with a surviving child. 'The fact of a death and a subsequent petition . . . arising out of that death simply obliterates almost any possibility of reunification. . . .' (*Id*. at p. 851, fn. 2.)" (*Ethan N., supra,* 122 Cal.App.4th at p. 65, fn. omitted.)

"The Legislature has, nevertheless, left open a 'tiny crack' to the parent who has been responsible for the death of his or her child. [Citation.] Subdivision (b)(4) of section 361.5 can be overcome by a showing, made with clear and convincing evidence, that reunification would be in a surviving child's best interest. (§ 361.5, subd. (c).)" (*Ethan N., supra,* 122 Cal.App.4th at p. 65.) As discussed in the previous section of this opinion, we reject Mother's argument there was insufficient evidence for the court to sustain a section 300, subdivision (f), allegation in the petition. This leaves Mother with the burden of showing reunification was nevertheless in Kyle's best interests.

"The concept of a child's best interest 'is an elusive guideline that belies rigid definition. Its purpose is to maximize a child's opportunity to develop into a stable, well-adjusted adult.' [Citation.] To that end, a court called upon to determine whether reunification would be in a child's best interest may, indeed, consider a parent's current

efforts and fitness as well as the parent's history. [Citation.] It must be noted, nonetheless, that the absence or amelioration of the problems that led to the dependency of siblings cannot alone support a finding of best interest for the purpose of section 361.5, subdivisions (b)(4) and (c). [Citation.] The absence of a negative does not, in this context at least, make a positive. The parent responsible for the previous death of another child must affirmatively show that reunification would be in the best interest of a surviving child." (*Ethan N., supra,* 122 Cal.App.4th at p. 66.)

Mother asserts she is no longer living with the same people, she has participated in some services, and it is incorrect to believe the old stereotype that people with mental retardation never improve. Mother asserts her visits with Kyle would be "enhanced" if she were engaged in services. She argues her mild mental retardation does not prevent her from functioning and she could change her past behaviors. She points to the good parenting skills she exhibited during visits: She fed, sang, kissed, and rocked Kyle to sleep. She changed his diaper. Kyle responded to Mother with smiles and giggles. This argument completely ignores the gravity of the problem that lead to the dependency. "It is difficult to imagine any problem more grave than the previous death of another child caused by abuse or neglect." (*Ethan N., supra,* 122 Cal.App.4th at p. 66.) It also ignores the reports concerning Kyle's multiple special needs, symptoms of autism, and severe anxiety around new people. Sadly, Kyle was barely one month old when taken into protective custody, he has rarely seen Mother over the past year, and he has recently developed a strong negative reaction when approached by someone he perceives as a stranger. As noted by the social worker, Mother's re-introduction at this point would cause Kyle distress. In addition, it is undisputed Kyle will likely require a high degree of medical care and therapy in the future from a responsible adult. Under these circumstances, it cannot be said the juvenile court abused its discretion in concluding Kyle's best interests would not be served by extending reunification services to Mother.

IV

The order is affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.